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ABSTRACT

Because the Supreme Court has not interpreted a case pertaining to the least restrictive environment (LRE) mandate of the Individuals with Disabilities Education Act (IDEA), Supreme Court cases interpreting the Act's other requirements guide any analysis of LRE. In addition, federal appellate court decisions related specifically to LRE are considered persuasive in LRE litigation. The IDEA leaves decisions regarding what is a free appropriate public education up to the members of the multidisciplinary team and declines to require execution of services to a "maximum" standard. On the other hand, the IDEA requirements for LRE do require execution of LRE to the maximum extent. Issues in IDEA cases include the Act's preference for mainstreaming, placement of the burden of proof, and interpretation of least restrictive environment. Specific cases that have interpreted IDEA's least restrictive environment requirement include Daniel R. R. versus State Board of Education (1989); Greer versus Rome City School District (1991); Board of Education, Sacramento City Unified School District versus Holland (1992); and Oberti versus Board of Education (1993). In summary, the federal appellate courts have recognized the following factors when making placement decisions for a child with disabilities: educational and noneducational benefits, effects of the presence of the child on the regular class, the costs of supplementary aids and services, and the extent of the modifications necessary. (Contains 13 references.) (JDD)

REFLECTIONS ON REFORM: INCLUSION FROM CONGRESS TO COURTS TO CLASSROOMS

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REFLECTIONS ON REFORM: INCLUSION FROM CONGRESS TO COURTS TO CLASSROOMS

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Congress: Federal Legislation

In 1975, The Education for all Handicapped Children Act (EHA) was signed into law. Congress passed the original Act after listening to testimony and statements during congressional hearings on the subject of educational services for children with disabilities that:

> (3) more than half of the handicapped children in the United States do not receive appropriate educational services which would enable them to have full equality of opportunity;
>
> (4) one million handicapped children in the United States are excluded entirely from the public school system and will not go through the educational process with their peers. (20 U.S.C. § 1400 (b))

In many states, children with disabilities were specifically excluded from public school programs (Weintraub & Ballard, 1982). Although some

states were attempting to provide special education, even these states failed to adequately provide for the education of children with disabilities due to serious problems with administration and financing of services (Rothstein, 1990). Congress created the EHA to entice state and local school officials to improve these inadequate methods of educating children with special needs through legislation with an expressed purpose of providing children with disabilities access to public education and requiring states to adopt procedures that will result in individualized consideration of and instruction for each handicapped child" (*Henrick Hudson District Board of Education v. Rowley*. 1982).

The Education of all Handicapped Children Act is technically an amendment to Public Law 91-230, the 1970 Education of the Handicapped Act. The Act was amended a number of times, including Public Law 101-476, the Amendment of 1990, which changed the name of the Act to the Individuals with Disabilities Education Act (IDEA). The Act was landmark legislation which represented an indisputable congressional commitment to end the segregation of children with disabilities. There would have been no need for IDEA if schools had the resources, ability, and willingness to educate children with disabilities with their nondisabled peers.

The Act specifically addressed the issue of least restrictive environment. The IDEA requirement for placing children in the least restrictive environment requires:

(1) That to the maximum extent appropriate, children with disabilities, including children in pubic or private institutions or other care facilities, will be educated with children who are nondisabled; and

(2) That special classes, separate schooling, or other removal of children with disabilities from the regular educational environment will occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. (Individuals with Disabilities Education Act, 20 U.S.C. § 1412 (5)(B))

Because the Supreme Court has not interpreted a case pertaining to IDEA's least restrictive environment mandate, Supreme Court cases interpreting the Act's other requirements guide any analysis of LRE. In addition, federal appellate court decisions related specifically to LRE are considered persuasive in LRE litigation. These will be discussed in the sections that follow.

Courts : Federal Litigation

Compliance with the mandates of the Act requires a balance between providing a free appropriate public education (FAPE) and the requirements of least restrictive environment (LRE). The *Daniel R.R.* (*Daniel R.R. v. State Board of Education*, 1989) appellate court referred to this as a tension created by these two provisions of the Act. Schools must both provide an individual education tailored to each child's unique needs while at the same time educate students with disabilities with their nondisabled peers (*Daniel R.R. v. State Board of Education*, 1989) . The lack of an explicit IDEA definition of FAPE has been a source of trouble for some educators, parents, and policy makers, however, the reservation of a definition was not simply a Congressional oversight The Supreme Court in *Rowley* explained that

> The primary responsibility for formulating the education to be accorded a handicapped child, and for choosing the educational method most suitable to the child's needs, was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child (*Hendrick Hudson District Board of Education v. Rowley* , 1981, p. 207)

In *Daniel R.R. v. State Board of Education* (1989) , the Fifth Circuit pointed out that:

> Schools must retain significant flexibility in educational planning if they truly are to address each child's needs. A congressional mandate that dictates the substance of educational programs, policies and methods would deprive school officials of the flexibility so important to their tasks. Ultimately, the Act mandates that every child with a disability receive an education that is responsive to his needs, but leaves the substance and the details of that education to state and local school officials. (*Daniel R.R. v. State Board of Education,* 1989, at 1044)

Not only does the Act appear to leave decisions regarding what is a free appropriate public education up to the members of the multidisciplinary team, FAPE also declines to require execution of services to a "maximum" standard. On the other hand, the IDEA requirements for LRE do in fact require execution of LRE to the maximum extent.

General Interpretation Issues of IDEA Cases

Issues for Review

Although the Supreme Court has not addressed the Act's requirement for least restrictive environment, in *Hendrick Hudson Dist. Bd. of Ed. v.*

Rowley, (1981), the Supreme Court defined the issues for review in IDEA cases as follows:

> First, has the State complied with the procedures set forth in the Act? And Second, is the individualized educational program developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits? (*Hendrick Hudson Dist. Bd. of Ed. v. Rowley*, 1981, at 206,207)

Rebuttable Presumption in Favor of Mainstreamining

The courts have repeatedly identified the Act's preference for "mainstreamining" in the least restrictive environment (*Board of Education, Sacramento City Unified School District v. Holland*, 1992; *Daniel R.R. v. State Board of Education*, 1989; *Greer v. Rome City School District*, 1991; *Oberti v. Board of Education*, 1993; *Roncker v. Walter*, 1983). Although school districts are directed to provide a full continuum of placement alternatives ranging from full inclusion to completely segregated settings, the least restrictive option of full inclusion must be considered first (*Sacramento City Unified School District v. Holland*, at 882, note 9).

This clear preference for mainstreamining rises to the level of a rebuttable presumption that is not overcome simply by showing that the

special education class placement is academically superior (*Sacramento City Unified School District v. Holland*, 1992 ;*Oberti v. Board of Education*, 1993). The Act's presumption in favor of mainstreamining requires that a child with a disability be educated in the regular class, even if it is not the best academic setting for that child (*Oberti*, 1993, at 1217). The child is to be placed in special classes only if the child cannot receive an appropriate education in a regular class, even with support services. A decision to remove the child from regular class must therefore be based on actual evidence that the child cannot receive an appropriate education, and must be a case-by-case decision rather than a decision based on the group or category of disability (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 878). The *Oberti* (1992) trial court likened this preference for inclusion to the preference for inclusion found in *Brown v. Board of Education*, (1954), in which the Supreme Court highlighted the importance of a desegregated education and the inequality inherent in any segregated educational system (*Oberti v. Board of Education*, 1992, at 1326, note 7).

Burden of Proof

The burden of proof is explicitly placed on the state rather than the individual with disabilities in the Rehabilitation Act of 1973 20 U.S.C.

§1412(5)(B), which was legislated to prevent discrimination against individuals with disabilities. Similarly, courts have held that the burden of proof in IDEA cases should be placed on the school district. The statutory presumption in favor of mainstreaming has been interpreted as imposing a burden on the school district to prove, by a preponderance of the evidence, that the child cannot be mainstreamed or that a proposed placement provides mainstreaming to the maximum extent appropriate (*Board of Education, Sacramento City Unified School District v. Holland*, 1992; *Oberti v. Board of Education*, 1993). In *Oberti v. Board of Education* (1993), the Third Circuit reasoned that it is appropriate to always place the burden of proof on the school because to do otherwise would turn the Act's strong presumption in favor of mainstreamining "on its head if parents had to prove that their child was worthy of being included, rather than the school district having to justify a decision to exclude the child from the regular classroom " (*Oberti v. Board of Education*, 1993, at 1219).

Interpretation of Least Restrictive Environment

Because the Supreme Court has failed to define LRE, federal appellate court cases act as a guide to the interpretation of LRE cases outside their circuit's district. The dispositive cases in interpreting

IDEA's least restrictive environment requirement include *Daniel R.R. v. State Board of Education* (1989), *Greer v. Rome city School District* (1991), *Board of Education, Sacramento City Unified School District v. Holland* (1992), and *Oberti v. Board of Education* (1993). These cases will be discussed in the sections that follow.

Daniel R.R. : The Two-Part Test

In Daniel R.R., the Fifth Circuit established a two-part test by asking two paramount questions which have been asked in subsequent cases. The first question was whether the child could be educated in the regular classroom satisfactorily, with supplemental aids and services. The second question was whether the child has been mainstreamed to the maximum extent appropriate.

Part One Of the *Daniel R .R.* Test : Three Stages of Inquiry. In order to answer the first question of whether the child could be educated in the regular classroom satisfactorily with supplemental aids and services, the court enumerated three stages of inquiry. First, the court asked whether the LEA can achieve education in the regular class satisfactorily, after the state has taken steps to accommodate the child in the regular classroom? Several factors were identified which assist in this first stage of inquiry:

1. Has the state made an effort to take these accommodating steps?
2. If the state is providing supplemental aids and services , are these efforts sufficient, and
3. Has the state made more than mere token gestures?

(*Daniel R.R. v. State Board of Education,* 1989, at 1048)

"If the state has made no effort to take such accommodating steps the court's inquiry ends, for the state is in violation of the Act's express mandate to supplement and modify regular education" (*Id.* at 1048). If the state is providing supplementary aids and services and is modifying its regular program, the court will then examine whether the state's efforts are sufficient (*Id.* at 1048). The Act does not permit states to make mere token gestures to accommodate students with disabilities; its requirement for modifying and supplementing regular education is broad (*Id.* at 1048). Although broad, the requirement is not limitless. States need not provide every conceivable supplementary aid and service to assist the child.

Furthermore, the Act does not require regular education instructors to devote all or most of their time to one child with disabilities or to modify the regular education program beyond recognition. The Fifth

Circuit stressed that mainstreaming would be pointless if instructors were forced to modify the regular education curriculum to the extent that the child with disabilities is not required to learn any of the skills normally taught in regular education. According to this court, a child in a class which had been modified beyond recognition as a regular class would be receiving special education instruction in the regular classroom; the only advantage to such an arrangement would be that the child is sitting next to a nondisabled student (*Id.* at 1049).

The second stage of inquiry in determining the answer to the first question of whether the child can be educated in the regular classroom satisfactorily, with supplemental aids and services, involved the following series of questions :

1. Will the child will receive educational benefit from regular education?
2. Will child receive any other benefit from regular education?
3. What effect does the child's presence have on the regular classroom environment, and thus on the education that the other students are receiving? (*Id.* at 1049)

In order to answer the question of whether the child will receive educational benefit from regular education, the court considered the

student's ability to grasp the essential elements of the curriculum , the nature and severity of the child's disability as well as the curriculum and goals of the regular education class - for example, if the goal of a particular program is to enhance development as opposed to teaching a specific subject such as reading or mathematics, the inquiry must focus on the child's ability to benefit from the developmental lessons (*Id.* at 1049).

In determining whether the child would receive any other benefit from regular education, the Fifth Circuit recognized that integrating a child with disabilities into an environment with nondisabled peers may be beneficial in and of itself. The Fifth Circuit therefore extended inquiry beyond the educational benefits that the child may receive in regular education and examined the child's overall educational experience in the mainstreamed environment, balancing the benefits of regular and special education for each individual child. The non-education benefit the child receives may tip the balance in favor of mainstreaming even if the child cannot flourish academically.

According to the Fifth Circuit, one of the many advantages of mainstreamining is the experience and behavioral models available from children without disabilities. Although a child with disabilities may not

be able to absorb all of the regular educational curriculum, he or she may benefit from nonacademic experience in the regular educational environment (*Daniel R.R. v. State Bd. of Ed.*, 1989).

Finally, the Fifth Circuit sought the answer to the first question of whether the child can be educated in the regular classroom satisfactorily, with supplemental aids and services, by employing a third stage of inquiry. This third stage of inquiry required determining the effect of the presence of the child with disabilities on the regular classroom environment, and thus on the education that the other students were receiving. The Fifth Circuit recognized that the placement of a child with a disability into a regular class may prove troublesome for two reasons. First, the child may be so disruptive that the needs of the child cannot be met in the regular environment. Second, the child may require so much teacher time, the rest of the class suffers (*Id.* at 1049).

Part Two of the *Daniel R.R.* Test. The Fifth Circuit explained that if the first question was answered affirmatively, and the child could in fact be educated in the regular classroom satisfactorily, with supplemental aids and services, then the child was to be educated in the regular class. If, on the other hand, it was determined that education in the regular class could not be achieved satisfactorily, even with supplemental aids

and services, then the school must shift to part two of the test and ask whether the child has been mainstreamed to the maximum extent appropriate. The Act does not contemplate an all or nothing educational system, but instead requires schools to offer a continuum of services with the appropriate mix varying from year to year, depending on the needs of the child. If the schools have provided the maximum appropriate exposure to nondisabled students, they have fulfilled their obligation.

Greer

Balance Between FAPE and LRE. In *Greer v. Rome City* (1991), the Eleventh Circuit affirmed the district court's decision, citing the Fifth Circuit's description of the tension by created by the Act's mandate for FAPE and LRE (*Daniel R.R. v. Board of Education*, 1989). This tension arises as schools are required to balance the requirements for FAPE against the requirement to provide education, to the maximum extent appropriate, in the regular classroom. In reaching a decision, the Fifth Circuit first asked whether the school was providing a free appropriate public education (FAPE), by asking:

(1) Were IDEA procedures followed by the local education agency?

(2) Was an individualized education plan (IEP) developed which

was reasonably calculated to achieve an educational benefit? (*Greer v. Rome City School District*, 1991, at 695).

The district court (*Greer v. Rome City School District*, 1990) explained that if a school district failed to provide FAPE, there is a violation of IDEA and the parents win. The significance of this point can not be overstressed. If there is no FAPE, LRE is not an issue - it is not even addressed. Many other court decisions which may appear to be in favor of a more restrictive of two placement options- specifically residential placement for children with autism or SED, are actually FAPE cases. In other words, the courts have found that in cases in which there is no FAPE, school districts must pay for expensive residential treatment in order for the child to receive FAPE. The district court explained that only if there is FAPE, can the next question be asked: whether the FAPE is provided in the LRE.

Application of *Daniel R.R.*. The Eleventh Circuit agreed with the district court that the school district had developed an appropriate IEP in accordance with the procedures provided for by the Act (*Greer v. Rome City*, 1991). Once a determination was made that the school district had complied with the Act's FAPE requirement, the Eleventh Circuit turned its attention to the issue of whether the school district had complied with

the Act's LRE requirement. The appellate court affirmed the district court's decision (*Greer v. Rome City*, 1990) that school officials had failed to meet the first part of the two-part test established by the Fifth Circuit in *Daniel R.R. v. State Board of Education* (1989). The Eleventh Circuit chose to apply the two-part test established by the Fifth Circuit in *Daniel R.R.*, because "this test adheres so closely to the language of the act, and therefore clearly reflects Congressional intent" (*Greer v. Rome City School District*, 1991, at 696).

The district court examined the facts presented during the bench trial and determined that the individual program developed for Christy was not provided in the least restrictive environment. After listening to testimony, the district court found that Christy received benefit from the regular class, that Christy was not disruptive, and that Christy did not take a disproportionate amount of the teacher's attention. The district court concluded that the LEA could adequately educate Christy in the regular class with supplementary aids and services, in particular language and speech therapy (*Greer v. Rome City School District*, 1990). The Eleventh Circuit emphasized that "the school district's consideration of whether education in the regular classroom may be achieved satisfactorily with supplemental aids and services must occur *prior to*

and during the development of the IEP"(*Greer v. Rome City School District*, 1991, at 696). The appellate court went on to explain that it "is not sufficient that school officials determine what they believe to be the appropriate placement for a handicapped child and then attempt to justify this placement only after the proposed IEP is challenged by the child's parents"(*Greer v. Rome City School District*, 1991, at 696).

Least Restrictive Environment to the Maximum Extent. It is noteworthy that the district court referred to LRE to the maximum extent *possible*, rather than the maximum extent appropriate (*Greer v. Rome City School District*, 1990, at 942). Although the use of the word *possible* did not seem to significantly affect the outcome of the case and was not mentioned by the Eleventh Circuit in their decision, it is interesting that the district court chose this word, with its connotations, over the word *appropriate*.. The term "possible" is not used in the Act, however, in informal, colloquial usage, the term "possible" connotes a broad range of "probable" and "plausible"placement alternatives and options. In contrast, the term "appropriate" has a more restricted meaning. The term "appropriate" was used within the Act itself and interpreted by the Supreme Court in *Rowley* (*Hendrick Hudson District Board. of Education v. Rowley*, 1981), within the context of "appropriate education". According

to *Rowley*, "appropriate education" refers to an education that is developed by a team of professionals, the parents, and the child, where appropriate, following the procedures of the Act (*Hendrick Hudson District Board of Education v. Rowley*, 1981). An appropriate education is also one that is reasonably calculated to provide some educational benefit to the child with disabilities. Within the context of LRE, "appropriate" may connote an environment which the team presumes to be best for the child. This may explain the special education directors testimony when she was asked about the possibility of implementing the goals of Christy's IEP in a regular class with supplemental aids and services. In her testimony, she replied, "What would prohibit it is I do not believe that it is appropriate" (*Greer v. Rome City*, 1991, at 692).

Jurisdiction Issue. In the December 26, 1991 opinion, the Eleventh Circuit raised *sua sponte* whether they had jurisdiction (*Greer v. Rome City School District*, 1991, at 694). The school district contended that the Eleventh Circuit had jurisdiction pursuant to 28 U.S.C § 1291, which provides that appellate courts have jurisdiction of appeals from all final decisions of the district courts. The Eleventh Circuit concluded that although they did not have jurisdiction under 28 U.S.C.§ 1291, they did have jurisdiction under 28 U.S.C. § 1292(a)(1). They chose to exercise

jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which provides that courts of appeals have jurisdiction of immediate appeals from interloculatory orders of the district courts granting or refusing injunctions (*Greer v. Rome City*, 1991, at 694). In the opinion reached March 12, 1992, the Eleventh Circuit noted :

> In light of a member of the court pointing to a possible cloud over our jurisdiction, we conclude that the most expeditious and judicially efficient solution is to request that the district court determine whether the Greers' claims for reimbursement and compensatory services have been abandoned. (*Greer v. Rome City*, 1992, at 1026, 1027)

For this reason, the Eleventh Circuit withdrew the December 26, 1991 opinion and remanded the case back to the district court.

Holland

In *Board of Education, Sacramento City Unified School District v. Holland* (1992), the district court held that Rachel Holland could be educated full time in a regular class. Again, the court first determined what was meant by the requirement that children with disabilities must be mainstreamed to the maximum extent appropriate (Holland, at 878). The court followed *Daniel R.R. and Greer*, and examined the educational

benefits available, the noneducational benefits available, the effect of Rachel's presence on the teacher and on the other children, as well as the costs of supplementary aids and services. The *Holland* court found that the school district not only failed to meet its burden of establishing that Rachel Holland would not receive academic benefits in regular classes but also failed to demonstrate that placement in special classes would provide equal or greater educational benefit to Rachel (*Holland*, at 882). The court further found that Rachel was not disruptive, and did not take a disproportionate amount of the teacher's time. The court also suggested that a teacher's aide be used to assist the teacher.

The *Holland* court next examined the extent of curriculum modifications which were needed for Rachel. The court cautioned that curriculum modifications are required by IDEA, and may be a factor to consider in exclusion only when modifications bear on other legitimate factors that may be considered, such as possible negative effects on other students in the class (*Holland,* at 879-80). For example, modification may place undue burdens on the teacher or deprive the child with disabilities of that sense of belonging to a regular class that is important to the achievement of nonacademic benefit (*Holland*, at 880).

For the reasons discussed above , the court found that the appropriate placement for Rachel was the regular class, with some supplemental services, as a full-time member of that class. The court also noted that if Rachel did not flourish under this placement in the future, then adjustments should be made (*Holland,* at 884).

Oberti

Further Support for *Daniel R.R.*. . In *Oberti v. Board of Education* (1992), the Third Circuit upheld the district court's decision that the most appropriate placement for Rafael Oberti, a young child with Down's Syndrome, was a full-time regular class placement. After hearing testimony from the regular classroom teacher, the district court found :

> "...testimony suggests that the School District failed to support Rafael's inclusion from the very beginning and thus designed a trial experience for Rafael in the developmental kindergarten which might have been expected to fail, and which, indeed, at least in part, fulfilled such an expectation. (*Oberti* , 1992, at 1333)

Application of *Daniel R.R.* . The Third Circuit affirmed the decision of the district court, although they had a different interpretation of IDEA's mainstreaming requirement. The district court reached this decision by applying the test adopted by the Sixth Circuit in *Roncker v.*

Walter (1983) which requires the court to determine whether services which make special education placement superior could be feasibly provided in a regular class. The Third Circuit chose to follow Daniel *R.R., Greer, and Holland* , adhering to the two-part test established in *Daniel R.R.* (*Daniel R.R. v. State Board of Education*, 1989). The Third Circuit believed that the *Daniel R.R.* two-part test closely tracked the language of § 1412(5)(B), and was "faithful to IDEA's directive that children with disabilities be educated with non-disabled children" (*Oberti v. Board of Education*, 1993, at 1215). The Third Circuit explained that the *Ronker* test failed to make clear that even if full-time regular classroom placement cannot be achieved, the school is still required to include the child with disabilities in programs with children without disabilities whenever possible.

The Third Circuit's use of the term "possible" seemed to accurately reflect their concern that a school district give due consideration to possible, feasible, potential, probable, conceivable, credible, imaginable supplemental aids and services to support the inclusion of children with disabilities in a regular class placement, stressing:

> the Act and its regulations require schools to provide supplementary aids and services to enable children with disabilities to learn

whenever possible in a regular classroom . (*Oberti v. Board of Education*, 1993, at 1216)

The appellate court closely followed *Daniel R.R.* as they applied the two-part test. The Third Circuit explained that a district court must examine three factors when applying the first part of the two-part test: (a) the steps taken to include the child, (b) the comparison between benefits of a regular class placement and benefits of a special class placement, and (c) the negative effects on the other children in the regular class.

The Third Circuit reviewed the findings of fact made by the district court relative to these three factors in order to determine whether those findings were clearly erroneous. The Third Circuit first examined the district court findings regarding the steps the school took to try to include Rafael in the regular class. The appellate court noted that the district court's finding that the school district had not taken meaningful steps to include Rafael in the regular classroom with supplemental aids and services was not clearly erroneous (*Oberti v. Board of Education*, 1993).

Second, the Third Circuit examined the district court's comparison of the educational benefits Rafael would receive in the regular classroom

and the benefits he would receive in the special education classroom. The district court paid special attention to the unique benefits Rafael would obtain in the regular classroom, such as the development of social skills and communication skills. The Third Circuit emphasized that the Act does not require states to offer the same educational experience to a child with disabilities as is generally provided for nondisabled children, nor does the academic progress in the regular class need to be as great as the progress made in the special education class. The fact that the educational experience is qualitatively different from the education of other children in a regular class or quantitatively different from the education received in a special eduction class does not justify exclusion of the child from the regular classroom environment. After reviewing the record, the appellate court concluded that the comparison of the benefits of a segregated versus an integrated placement supported the district court's conclusion that the School District's selection of a segregated placement did not comply with the Act's requirements (*Oberti v. Board of Education*, 1993).

Finally, the Third Circuit examined the district court's findings regarding the negative effect of Rafael's behavior on the other students. The appellate court emphasized that this factor must be considered while

keeping in mind the school's obligation to provide supplementary aids and services because an adequate program may prevent disruption that would otherwise occur. Again, the Third Circuit concluded that the district court's findings on this issue were not clearly erroneous.

After examining these three factors, the Third Circuit agreed with the district court that the school district did not meet its burden of proving by a preponderance of the evidence that Rafael could not be educated in a regular class with supplemental aids and services. They affirmed the district court's decision that the school district violated the LRE requirement of IDEA. Because the Third Circuit reached this conclusion based on the first part of the *Daniel R.R.* test, they decided that they did not need to determine whether Rafael had been included in regular classrooms to the maximum extent possible.

Classrooms : Application

These federal cases provide guidelines for regular classroom teachers, special education teachers, administrators, and other members of the multidisciplinary team as they determine whether a placement is in fact the least restrictive environment for a given child with a disability. In summary, the federal appellate courts have recognized the following factors to be considered when making placement decisions for a child

with disabilities:

1. Are there benefits to the child with disabilities? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1049; *Greer v. Rome City*, 1991, at 696,697; *Oberti v. Board of Education*, 1993, at 1216)

   a. Are there educational benefits?

      Are there benefits in traditional academic areas such as reading, math, written language, or areas such as oral language? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1040; *Greer v. Rome City*, 1991, at 696,697; *Oberti v. Board of Education*, 1993, at 1216)

   b. Are there non-educational benefits? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1049; *Greer v. Rome City*, 1991, at 697; *Oberti v. Board of Education*, 1993, at 1217)

      Does the child learn any social skills or will the child be

more accepted by nondisabled peers if they are included in the regular class? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879,880; *Daniel R.R. v. State Board of Education*, 1989, at 1049; *Greer v. Rome City*, 1991, at 697; *Oberti v. Board of Education*, 1993, at 1217)

2. Wnat are the effects of the presence of the child on the regular class? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1049; *Greer v. Rome City*, 1991, at 697; *Oberti v. Board of Education*, 1993, at 1217,1218)

   a. What are the effects on the other children in the regular class? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1049; *Greer v. Rome City*, 1991, at 697; *Oberti v. Board of Education*, 1993, at 1217,1218)

      Does the child disrupt the class or take too much teacher time away from other children? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1049;

Greer v. Rome City, 1991, at 697;*Oberti v. Board of Education*, 1993, at 1217,1218)

Would a teacher assistant alleviate or diminish disruptiveness? (*Oberti v. Board of Education*, 1993, at 1217)

b. What are the effects on the regular classroom teacher? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1049; *Greer v. Rome City*, 1991, at 697; *Oberti v. Board of Education*, 1993, at 1217)

Does the child with disabilities require an extraordinary amount of teacher time? Would a teacher assistant help? (*Oberti v. Board of Education*, 1993, at 1217)

3. What are the costs of supplementary aids and services? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 882, 879, 880; *Greer v. Rome City*, 1991, at 697)

Consider costs in relationship to the effects on the other children with disabilities and nondisabled peers, both in the regular class and in the district as a whole. (*Board of*

Education, Sacramento City Unified School District v. Holland, 1992, at 882,879, 880; *Greer v. Rome City*, 1991, at 697)

4. What is the extent of the modifications necessary? Are the modifications so extensive that the class no longer looks like a regular class? (*Board of Education, Sacramento City Unified School District v. Holland*, 1992, at 879; *Daniel R.R. v. State Board of Education*, 1989, at 1048,1049)

In addition to these questions which may act to guide multidisciplinary team members as they make decisions regarding placement, the federal cases have provided guidelines regarding the degree of supplemental aids and services and modifications which should be attempted, as well as the degree of "attempting" that should take place. This is best illustrated in Table 1, which contrasts the Oberti district court's findings of fact regarding what the school failed to do with what could have been done instead.

Insert Table 1 About Here

The *Oberti* case also illustrates the importance of determining whether supportive services are adequate by examining whether or not the

child is effectively included in the regular class. In other words, members of the multidisciplinary team will know that the level of support, supplemental aids, and services are sufficient if inclusion is working. Although the Fifth Circuit (*Daniel R.R. v. State Board of Education*, 1989) acknowledged that it is not necessary for the regular classroom teacher to provide every conceivable supplementary aid and service to assist the child or to modify the program beyond recognition (*Daniel R.R.* at 1048), it appears that the Third Circuit (*Oberti v. Board of Education*, 1989) requires much more of an attempt to provide assistance to the regular classroom teacher.

Although not explicitly stated in the decision, it appears that the failure of Rafael regular classroom placement was considered prima facie evidence that the school did not provide adequate services. In the past, a child's failure in the regular class was seen as evidence that the child could not be fully included in a regular class, and instead, needed special education. " Creating accommodations for children with disabilities within mainstream education programs is a challenge for all involved, and we are sure, if of nothing else, that in the process both parties need all the help they can get" (*Oberti* at 1337).

The Third Circuit enumerated a number of commonly applied strategies which Dr. Lou Brown outlined during his bench trial testimony (*Oberti*, 1993). According to Dr. Brown, these strategies could be used to integrate Rafael into the regular classroom. These suggestions, which provide an excellent rubric for special educators and regular educators as they seek to provide services to children with disabilities who are fully included in the regular classroom, included:

1. Modify some of the curriculum to accommodate the different ability level of a child with disabilities.
2. Modify only the child's program so that the child with disabilities can perform an activity similar to an activity performed by the entire class, but appropriate to the child's ability level.
3. Have the child work on a completely separate activity in "parallel Instruction" while other children are working on a different activity.

4.CCC Remove the child from the regular class and provide some special instruction in a resource room, completely apart from the class.

REFERENCES

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Table 1

Suggestions Regarding Supplemental Aids and Services from the Oberti District Court

What the *Oberti* Court Found	What Should Have Been Done
1. No structured special education consultation	1. Structured consultation
2. No formal coordination between special and regular components	2. Formal coordination between special and regular components
3. Only informal contact with the speech therapist	3. Formal contact with speech therapist
4. Behavior management that was reactive, not well-planned nor integrated into IEP	4. Well-planned behavior management plan, integrated into IEP
5. Contact by the Child Study Team but no evidence to suggest that the communication was adequate to create an individualized management plan	5. Formal contact with supportive services such as Child Study Team
6. No comprehensive individualized program	6. Comprehensive individualized program
7. No systematic support resulted in failure of program	7. Systematic support
8. No teacher's aid until March	8. Use of teacher aids and assistant